capital available to any company or industry at any given time is not unlimited. By the middle of 1999, Qwest will have invested over two billion dollars in constructing the most advanced nationwide network yet built, with the kinds of speeds and capabilities that the Commission and Congress hope to encourage under Section 706. As discussed above, this network is the backbone for significant cutting-edge governmental, university research, and industry applications. The Commission cannot not also expect Qwest to invest in last mile facilities (the electronics, collocation, engineering and network design, and transport costs) across the entire United States.

Qwest's network -- along with several others -- will be available to any ILEC that provides long distance service -- yet the Commission would allow the ILEC to fence off its network (for which there are no competitive alternatives) from the reach of competitors. Other companies are investing capital in competitive local facilities. The point is that no one company can construct network to serve every end user throughout the country.

The Commission assumes that because the ILEC and its competitors both enter the market for advanced, broadband services such as xDSL with no market share, they are on the same footing: that they are all lined up at an imaginary starting line at the same time. But the ILECs will have volumes that competitors cannot match. Under the FCC's proposal, they can market advanced services to their existing local exchange customer base without switching their customers' local service provider (the ILEC). The ILEC can continue to provide local exchange service to their customers, while adding the xDSL service through the affiliate. In contrast, in order to offer a comparable package of services, competitors must be able not only to provide xDSL service but also to provide local exchange service, and to persuade the customer to switch its local carrier. As the Commission is well aware, ILEC competitors have not yet been able to penetrate the local exchange market in any serious numbers, whether via resale or unbundled elements.

At least one ILEC has acknowledged that volume is required to make deployment of xDSL technology justifiable, particularly in less densely populated areas. US West argued in its Section 706 petition that because it serves many less densely populated areas, and thus has lower volumes of customers per switch, it needs special incentives to invest in xDSL technology to serve those customers. 22/ As US West stated in its FCC petition:

> [D]eploying xDSL to a central office requires enormous capital investments: US West must install one or more DSLAMs in each central office, prepare the loops of each MegaBit Service subscriber, and cable the office to a network of ATM switching systems. 23/

US West also observed that

22/ Petition of US West Communications, Inc. for Relief from Barriers to Deployment of Advanced Telecommunications Services, FCC Docket No. 98-26, filed February 25, 1998 ("US West Petition") at 25-26.

23/ US West Petition at 35.

> The central office equipment used to provide MegaBit service is expensive: a basic, 128-user DSLAM costs approximately $73,000 installed (and several might be necessary), an installed ATM switching system costs approximately $350,000, and the DS-3 networking needed to connect the central office with other central offices can cost several hundred thousand dollars. . . . 24/

US West also correctly identifies residential and small business customers as the most vulnerable to being left out because of the relatively higher cost of serving them. 25/

US West believes it is hard to justify investing in adding xDSL for each central office serving area, even though it does not need to collocate and is not restricted in the use of collocated switching equipment, has an interoffice transport network already in place, and has the entire local customer base over which to spread the cost of that technology. One need only imagine how difficult it would be for each of US West's competitors to justify that investment.

Moreover, the FCC's underlying *assumption* -- that every potential competitor can be facilities-based -- is also false and contrary to the Congressional recognition that competitors should be free to enter the local market whether or not

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24/ *Id.* at 31-32. Based on conversations with vendors LCI believes the costs cited here to be low. The costs cited in footnote 40 below are more in line with current market conditions.

25/ *Id.* at 26.

they own facilities. 26/ The Commission's proposed approach would create a high entry barrier for advanced services, leaving the market highly concentrated at best.

With all this, one might wonder why an RBOC would not conclude that the best way to recover its investment in xDSL equipment is to make it available to *all* carriers, thus maximizing volume. The answer is that ILECs are always reluctant to allow competitors to use their last mile facilities. That is the problem that required the Bell System divestiture. That is the problem that required Congress to enact Section 251 in the first place.

The Commission should not place its hopes on the possibility that some other carrier's-carriers will develop that will solve the economic problems just listed for carriers that lack the volumes of the ILECs. We are not saying this could never happen. However, no significant carrier's carrier has yet emerged in the local market to date, despite the obvious need for such a carrier. 27/ The reasons are

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26/ See Iowa Utilities Board v. FCC, 120 F.3d 753, 814 ("Nothing in [section 251(c)(3)] requires a competing carrier to own or control some portion of a telecommunications network before being able to purchase unbundled elements.").

27/ In the wireless market, despite the existence of multiple wireless networks, no carrier's carrier has developed, and wireless carriers have fought having resale obligations imposed on them. See, e.g., Personal Communications Industry Association Petition for Forbearance for Broadband Personal Communications Services, WT Docket No. 98-100 et al., FCC 98-134, released July 2, 1998, recon. pending (denying PCS providers request for forbearance from resale obligations). A survey of wireless resellers conducted by the Telecommunications Resellers Association has shown that wireless resellers are finding it very difficult to obtain resale arrangements with PCS carriers, despite their obligation to provide resale and the fact that they are, by definition, at least the third wireless network in each market in which they operate. See id. at para. 38.

complex, ranging from the massive resistance of the ILECs to any competition, to the sheer difficulties of establishing widespread local networks in the best of circumstances. Significantly, these problems have plagued CLEC competition even in the conventional circuit-switched world. As we move to packet switching new problems inevitably will arise. Qwest shares the hope that eventually Section 251 will be "fully implemented" such that the ILEC local exchange market power is broken. But we are a long way from that day

In sum, the Commission should not adopt a proposal that will have the effect of denying to competitors the ability to provide competing service without owning -- and collocating in every central office -- the facilities necessary to provide that service.

III. THE SEPARATE AFFILIATE PROPOSAL WILL NOT ACCELERATE ILEC DEPLOYMENT OF ADVANCED SERVICES.

The Commission makes another fundamental false assumption in the NPRM: That allowing the ILECs to provide xDSL without permitting access to that capability by competitors will somehow accelerate the rate of ILEC investment. There is no evidence to support this claim On the contrary, all of the BOCs and GTE have announced or begun plans for rollout of xDSL service. 28/

28/ All of the RBOCs and GTE have announced deployment of xDSL technology in their regions. See "Bells, GTE, and Computer Giants Say ADSL Working Group Will Speed Deployment," Telecommunications Reports, February 2, 1998, at 23-24 (US West); "SBC's Pacific Bell Unit Unveils ADSL Plans, Files Pricing Tariff," Telecommunications Reports, June 1, 1998, at 34 (SBC); "Bell Atlantic to Offer High-Speed Links to Net," Washington Post, June 4, 1998, at E3; "BellSouth Plots Ambitious ADSL Plan," Multichannel News, May 25, 1998, at 1 (BellSouth and

Furthermore, consumer demand should provide ample incentive to develop the technology. Qwest itself has an enormous demand for high speed connectivity to our customers, and we are willing to pay reasonable cost-based rates for this capacity. In short, the ILECs do not need relief from regulatory requirements to create incentives for such investments. The real problem is ensuring that when ILECs meet market requirements, they do not charge supra-competitive prices and block competition. This market power generally leads to lower output, not higher. 29/

The FCC cannot reasonably expect that the ILECs will roll out advanced services faster simply because they are deregulated. Moreover, those services are likely to be provided first (and perhaps only) to high-end customers living in densely populated areas. Nothing will force the ILECs to deploy the technology downmarket, including the promise of deregulation. For this reason, Qwest has proposed that the FCC adopt mandates for ILEC deployment of advanced services.

Ameritech); News Release, "BellSouth Announces Aggressive 30 Market Roll-Out of Ultra-High Speed BellSouth.Net FastAccess ADSL Internet Services," May 20, 1998, at www.bellsouthcorp.com; "GTE Jumps Into xDSL Game as UAWG Works on Standard," Telecommunications Reports, April 20, 1998, at 18; "GTE to Offer Ultra-Fast Internet Access," April 13, 1998. Announcement on GTE website, www.gte.com/g/news/adsl041398.html.

29/ A common definition of monopoly power is the ability to raise prices and restrict output.

Even if it were true that deregulated treatment of advanced services investment would incent ILECs to speed xDSL deployment, the Commission should be wary of making such a bargain. If the Commission were to sacrifice competition in the name of a faster rollout of advanced services, it could have much greater impact on consumer choice than the current lack of competition in conventional local exchange service has had. In the future, broadband packet networks are likely to carry all communications, whether voice, data, images, or video. 30/ Far more services and service providers will be at the mercy of the last mile network owner. In addition, as more and more consumers get their information from the Internet, and as industry is increasingly dependent on the Internet to communicate (through e-mail and websites, for example) and to do business, the stakes are much higher if the last mile is not open to competitors.

"Equal-access" type requirements (for example, requiring ILECs to permit customers to access the ISP or IXC of their choice when subscribing to xDSL service) only partially address these concerns. 31/ In a full-service world, in which the ILEC will be able to provide a full range of services to its customers -- including local exchange telephony, long distance telephony, Internet access, information

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30/ "'A capacity-rich market' will result in low-bandwidth applications such as voice becoming 'virtually free to transmit and [thus] virtually free to customers' as voice is combined with data and offered as ancillary services." From "Satellites Must Adopt 'IP Efficiencies' or Become Mere Niche, Cisco Says," Communications Daily, Sept. 9, 1998, at 2, quoting Edward Kozel, Senior Vice President, Corporate Development, Cisco Systems.

31/ See Advanced Services NOI at para. 38.

services, wireless services, and perhaps others -- equal access requirements will not be enough to override a customer's strong inclination to engage in one-stop-shopping. 32/ To be successful against a full-service ILEC package, competitors will have to put together packages of services as well if they are to compete with the ILEC. This must include the broadband last-mile connectivity.

IV. ANY ILEC AFFILIATE THAT OWNS LOCAL NETWORK FACILITIES IS AN ILEC WITHIN THE MEANING OF SECTION 251(H).

The Commission is wrong in its view that as long as an affiliate is sufficiently separate from the ILEC, it may own local network facilities or equipment yet not be subject to Section 251(c) obligations. If an ILEC affiliate owns local network element capabilities, then it is an ILEC under Section 251(h), regardless of how separate it may be from the original ILEC network company.

In the Non-Accounting Safeguards Order, the Commission held that if an ILEC transfers to its 272 affiliate the "ownership of any network elements that must be provided on an unbundled basis under Section 251(c)(3)," that affiliate is an ILEC too under Section 251(h), because it is an "assign" of the ILEC. **33/** Yet, inexplicably, the Commission in the NPRM proposes to permit an ILEC to shelter

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32/ Even RBOCs that are not yet permitted to provide interLATA service expect to exploit their xDSL advantages by packaging advanced services with local exchange and Internet access services.

33/ Implementation of the Non-Accounting Safeguards of Section 271 and 272 of the Communications Act, CC Docket No. 96-149, First Report and Order and Further Notice of Proposed Rulemaking, FCC 96-489, released Dec. 24, 1998, at para. 309 ("Non-Accounting Safeguards Order") its investments in advanced local network improvements from competitors through the establishment of a Section 272-type affiliate. 34/

Under Section 251(h)(1), any ILEC affiliate that owns local exchange network facilities, equipment, or capabilities is necessarily a "successor or assign" of the ILEC under any common sense meaning of those terms. Any other reading would open a large loophole in the Act, and would permit an ILEC to evade the market-opening provisions of Section 251(c) by simply shifting its network capabilities and making its network investments through an affiliate. 35/

34/ Although the Commission did not explain its decision in the Non-Accounting Safeguards Order, the reasoning must have been that whether or not ILEC network facilities and capabilities are housed in an affiliate, those network facilities and capabilities must be made available to competitors under Section 251(c). In contrast, the Commission held that when the affiliate is providing local exchange service via purchase of ILEC unbundled network elements or via service resale, then the affiliate is not necessarily an ILEC within the meaning of Section 251(h). The Commission's ruling in the Non-Accounting Safeguards Order was based, moreover, on the factual record before it -- which did not include any actual operating Section 272 affiliates. In any case, if the Commission believes it to be necessary, it should reconsider that decision, which interpreted Section 251(h) without full briefing or consideration of the consequences.

35/ On January 22, 1998, LCI International Telecom Corp. (now a wholly-owned subsidiary of Qwest) filed a petition for declaratory ruling (the "Fast Track" petition) with the Commission asking the Commission to declare that if an RBOC created a structure that separated its network ("carrier's-carrier") functions from its retail functions (which would be housed in a fully separated affiliate with partial public ownership), then the Commission could conclude that the retail affiliate was not an incumbent LEC within the meaning of Section 251(h) (and also that the RBOC was entitled to a presumption that it met the requirements for interLATA entry set forth in Section 271). Petition of LCI International Telecom Corp. for Expedited Declaratory Rulings, CC Docket No. 98-5 ("LCI Petition"). A copy of the press release accompanying the filing of the petition, as well as a brief summary of the petition, is attached to these comments as Appendix B. Qwest also will file a copy of the petition in the record in this docket. The Commission put the petition out for two rounds of public comment, but has not yet acted on the petition.

Under the Act, if ILEC facilities are used to provide local exchange service, they are subject to Section 251(c). As the Commission stated in the NPRM, "if a BOC transfers to its affiliate ownership of any network elements that must be provided on an unbundled basis pursuant to section 251(c)(3), the affiliate would be deemed an assign of the BOC under section 3(4) of the Act with respect to those network elements." 36/ Nothing in Section 251(h) would suggest a different result if the facilities and equipment underlying the network elements is purchased directly by the affiliate, rather than transferred to the affiliate. The fact remains that the affiliate now owns the ubiquitous local exchange network (in this case, for advanced services) and it is the affiliate that must make that network available to competitors under Section 251(c) (as the "assign" of the ILEC for advanced services network capability). 37/

The Commission's proposed distinction is equivalent to a determination that any new investment by an ILEC is free and clear of the Act's

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Qwest supports the general approach taken in the LCI petition. We also emphasize here that the affiliate proposed by the Commission for ILEC advanced services is nothing like the affiliate proposed by LCI. As we explain below, a properly designed separate affiliate could arguably form the basis for a determination that the affiliate is not subject to Section 251(c), but the Commission's proposed affiliate has none of the necessary characteristics to permit such a determination to be made.

36/ NPRM at para. 90.

37/ Such an affiliate also would meet the Section 251(h)(2) test for LEC status because it occupies a "comparable position" to the ILEC and has "substantially replaced" the ILEC for the provision of advanced services.

market-opening provisions, so long as that investment is made in the name of the affiliate. 38/ Yet such an outcome runs completely counter to the FCC's own conclusion that the Act does not distinguish between old and new investment: all such investment is covered by Section 251(c)'s market opening provisions because all such investment is part of the incumbent local exchange carrier's network. Such an outcome also runs afoul of the Commission's statement that it is not proposing to forbear from applying Section 251(c) to advanced ILEC telecommunications investment or services. 39/ The practical effect of the FCC's action is to forbear from regulating any ILEC investment that is made through its separate affiliate.

38/ If a line is to be drawn under Section 251(h), then it should be drawn between ILEC network facilities, equipment, and capabilities on the one hand, and retail services on the other. An affiliate of an ILEC that owns these local network facilities, equipment, and capabilities is functioning as an "assign" of the ILEC insofar as it has become the keeper of the ILEC network (for certain elements), and thus is subject to Section 251(c) to the extent it is in possession of all or some of those capabilities. Such an affiliate also would meet the Section 251(h)(2) test of an ILEC because it occupies a "comparable position" to the ILEC and has "substantially replaced" the ILEC for the provision of advanced services. The Commission could reasonably conclude, however, that when an ILEC affiliate is offering local exchange service solely by using an ILEC's network elements or reselling its services, the affiliate is not necessarily an "assign" of the ILEC insofar as it is offering retail services using the ILEC's network elements, *but only if* the retail affiliate is sufficiently separated from the ILEC to enable the Commission to conclude that it is not an ILEC within the meaning of Section 251(h). As noted below, the Section 272 affiliate falls far short of the independence necessary in order to avoid being considered a "successor or assign."

39/ NPRM at para. 93. Indeed, as the Commission itself held in the Advanced Services Order, it lacks authority to forbear until Section 251 is fully implemented. Advanced Services Order at para. 69. As discussed below, moreover, the Commission lacks authority to forbear on a service-by-service basis.

There is nothing in the Commission's logic, moreover, that would limit the affiliate's unregulated status to advanced services. The Commission's proposed interpretation of Section 251(h) would create a giant loophole in the Act for all local network investment, not just for investment used to provide advanced services. Thus, an ILEC, under the Commission's logic, could place all its next generation gateway (combination packet/circuit) switches in the affiliate, and thereby eliminate competitors' access to such switches. It could similarly put all its third generation new fiber and loop electronics in the affiliate, leaving competitors with lower quality first generation fiber loops and transport. It could even invest in new loops, including (for example) fiber loops installed for existing customers, in the affiliate. All the electronics necessary to enable existing copper and fiber media to yield high speed loop and transport characteristics could be added to the network through the affiliate -- again relegating competitors to the older, lower bandwidth, inferior transmission speeds and characteristics. Any services that the ILEC provides over those facilities could be provided by the affiliate. They would not be subject to the Act's Section 251(c)(4) resale requirement, and would not even be tariffed (according to the Commission's proposed nondominant treatment of the affiliate).

It should be clear that over time, under the Commission's interpretation of the Act, the ILEC network would migrate to the unregulated affiliate, and the network element provisions that are so central to local competition would, in time, become an empty vessel for all practical purposes. In effect, the

FCC will have forborne from regulation of the ILEC network in any meaningful way -- without ever having required the ILEC to "fully implement" Section 251 and without ever having conducted the three-part forbearance analysis required under Section 10.

Put succinctly, competitors would be relegated to "horse and buggy" technology -- and so would consumers who desire to exercise a choice of providers. The adverse impact would also be immediate in the higher-end, business market. Qwest's customers very much need access to high-capacity loops to connect them to the high-capacity Qwest network. The ILECs have every incentive to delay deployment of the electronics in the network that can boost the capacity of existing loops until the ILECs can provide a competing end-to-end service. When the ILECs are ready to do so, they will simply invest in the electronics through the affiliate. It is likely to be impractical and uneconomic for competitors to deploy electronics to provide such local access, just as it would be to deploy xDSL electronics in every central office. Without access to ILEC dark fiber, it might even be impossible to do so.

In sum, the FCC should not adopt an interpretation of Section 251(h) that would exempt an ILEC affiliate that invests in advanced local network capability from allowing competitors to use that capability under Section 251(c).

V. THE COMMISSION'S PROPOSED SECTION 272-STYLE AFFILIATE IS NOT SUFFICIENTLY SEPARATE FROM THE ILEC TO ENABLE IT TO ESCAPE ILEC STATUS.

The Commission in the Advanced Service NPRM correctly recognizes that not just any affiliate will be considered to be "not an ILEC" under Section 251(h). 40/ Rather, the Commission implicitly acknowledges that such a reading of Section 251(h) would allow the ILECs to evade the Act simply by shifting their local exchange business to an affiliate that lacked any separation from the ILEC and any protections whatsoever against discrimination and anticompetitive activity. 41/

The Commission in the NPRM tentatively concludes that an ILEC affiliate that is "truly separate" and "truly independent" from the ILEC and that derives no "unfair advantage" from the ILEC would not be considered an ILEC under Section 251(c) of the Act, 47 U.S.C. § 251(c). 42/ Specifically, the Commission

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40/ As discussed in the preceding section, in Qwest's view, *any* affiliate of an ILEC that provides telephone exchange service is an ILEC under the Act. But assuming the Commission declines to adopt this view, then Qwest would agree with the Commission that under Section 251(h)(1), an ILEC affiliate that provides local exchange service would be deemed the assign of an ILEC unless it is fully independent of and truly separate from the ILEC, and unable to receive an unfair advantage from the ILEC. As discussed below, however, Qwest strongly disagrees that a Section 272 affiliate would satisfy this Section 251(h) test.

41/ See, e.g., NPRM at para. 87.

42/ In the NPRM, the Commission tentatively concluded that a separate affiliate that was structured along the lines proposed in the NPRM would not be an ILEC "successor or assign" under Section 251(h) of the Act, and thus would be exempt from the Section 251(c) market-opening provisions. Implicit in this analysis is the conclusion that if an affiliate is not sufficiently separate from or independent of the ILEC, it *would* be considered a "successor or assign" of the ILEC and therefore subject to Section 251(c) stated that "to be free of incumbent LEC regulation, an advanced services affiliate must function just like any other competitive LEC and not derive *unfair advantages* from the incumbent LEC." 43/ The Commission also said that an affiliate can be freed from ILEC status (and thus from Section 251(c) requirements) only if it is "*truly separate*" from the existing ILEC -- meaning that the ILEC is "willing to offer advanced services *on the same footing* as any of their competitors." 44/

None of these characteristics apply to the Advanced Services separate affiliate proposed by the Commission. That separate affiliate will have many advantages that unaffiliated CLECs will not have, including the same name as the ILEC, prices for inputs that do not reflect an actual cost of doing business, and the ability to engage in joint marketing with the ILEC. The affiliate and the ILEC also would be able to operate jointly in many ways and therefore are not "truly separate." We discuss these issues in this section. In the next section, we propose certain additional requirements that, if adopted and implemented by the ILEC, could form the basis for a Commission conclusion that the affiliate is separate from the ILEC and thus not an ILEC under Section 251(h).

We do not discuss here whether the Commission could impose separate affiliate requirements on an ILEC under other authority it possesses, other than to point out that the Commission does possess such authority and has often exercised it.

43/ NPRM at para. 87 (emphasis added)

44/ NPRM at paras. 83, 86, 92 (emphasis added).

We emphasize, as discussed elsewhere in these comments, that the Commission's proposed separate affiliate is nothing like the separate affiliate structure proposed by LCI in its January 1998 "Fast Track" petition. The corporate structure proposed by LCI would have separated the RBOC's retail and carrier's-carrier functions completely, and would have required independent public ownership of the retail affiliate, among other things. None of these characteristics are present in the Commission's proposal. which simply parrots Section 272's interLATA affiliate requirements.

A. The Section 272 Affiliate Is Not On the Same Footing As An Unaffiliated CLEC With Respect To the ILEC.

It is not clear why the Commission used the Section 272 affiliate as the basis for a conclusion reached under an entirely different section of the Act (Section 251(h)) that has an entirely different purpose from Section 272. Section 272 is designed to provide certain safeguards for BOC provision of interLATA services after the BOC has fully satisfied the competitive checklist and the other requirements of Section 271. It was not designed to guard against the problems that Section 251(h) was designed to guard against. i.e., when an ILEC transfers its local exchange functions to another company in an attempt to avoid its Section 251(c) market-opening obligations.

Thus Section 272 serves a different set of market problems that the Act itself recognized required different remedies. Section 272 addresses interLATA services, the market for which is highly competitive. has multiple networks with many carriers-carriers and low entry barriers (all in stark contrast to the local market, which is the subject of Section 251(h)) Significantly, the interLATA market also has long-standing equal access systems to govern interconnection to the bottleneck local exchange. Section 272 also was designed to apply *after* the BOC had fully implemented Section the competitive checklist, including all of the Section 251(c) market opening provisions. Thus, by the time the RBOC begins offering interLATA services, it will already have been found to have opened its local exchange to competition.

In contrast, the Commission here would allow an ILEC that has not yet met the minimal requirements of Section 251(c) to escape ever having to meet those requirements for advanced services, and to do so through an affiliate designed to contain not the BOC's *monopoly* activities but rather its *competitive* ones.

An examination of the safeguards that would apply to the proposed advanced services affiliate shows that the affiliate will not operate in a manner that is sufficiently separated from the ILEC to avoid "successor or assign status under Section 251(h). For example, the Computer II fully separated subsidiary for BOC provision of enhanced services was far more independent of the BOC than the Section 272 interLATA affiliate will be, as the Commission fully understood in the Non-Accounting Safeguards Order. 45/ Under the Section 272 affiliate, the BOC can share all services (other than operating, installation and maintenance) with its

45/ See, e.g., Non-Accounting Safeguards Order at paras. 154-55, 170.

affiliate. 46/ It can share building space and equipment (other than that used for transmission and switching) with the affiliate For example, the BOC and its affiliate can jointly own "office space and equipment used for marketing or the provision of administrative services." 47/ They can presumably share such administrative expenses as legal services, human resources, procurement and so on. Such sharing is problematic both because it reflects a real integration of day-to-day operations and because it permits the ILEC easily to shift costs to the affiliate. Volume discounts and other preferential arrangements that appear to be available to all competitors, but which suit the requirements and characteristics of the affiliate only, also could be present serious discrimination problems. 48/

Most significantly, the Section 272 affiliate is permitted to share marketing services with the BOC and can jointly use, with the BOC, marketing services provided by the parent. 49/ The BOC is also permitted to engage in the same marketing activities (for interLATA services) as its competitors; to engage in the "marketing and sale" of its affiliate's services, including engaging in such activities as "customer inquiries, sales function, and ordering," all without being subject to the nondiscrimination requirement of Section 272(c). 50/ After

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46/ Id. at para. 162.

47/ Id. at para. 162.

48/ Non-Accounting Safeguards Order at para. 257 (permitting volume discounts so long as they are available in a tariff or publicly disclosed agreement).

49/ Id. at para. 183.

50/ Id. at para. 296. See 47 U.S.C. 272(g)(3), 272(c).

interLATA entry is granted, "the BOC will be permitted to engage in the same type of marketing activities as other service providers." 51/ The BOC can also develop services together with its affiliate, provided that the BOC also is willing to develop services with a competitors. 52/

In sum, whatever the precise contours of permitted joint marketing activities, it is clear that the BOC and its Section 272 affiliate can work closely together on marketing. Under the Commission's proposed affiliate structure, the same can be true of an ILEC and its advanced services affiliate. This permissible joint marketing would not merely affect the ILECs' ability to jointly market such services as local and long distance telephony and Internet access. It would also permit them to include in packages and in joint marketing efforts their own ISP offerings, to the detriment of independent ISPs who also would have difficulty matching (or competing against) joint offerings. 53/

Another critical problem with the advanced services affiliate structure is that it does not successfully address the potential for discrimination in the pricing of network inputs provided by the ILEC to the affiliate. The Commission assumes that the ILEC affiliate will stand in the same shoes as any other CLEC because it will have to purchase unbundled loops at the same prices and obtain

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51/ Id. at para. 291.

52/ Id. at paras. 169, 210.

53/ See NPRM at para. 102.

collocation and other needed inputs at the same rates, terms and conditions as any competitor. 54/ But the prices paid by the affiliate are not actual cost inputs from the point of view of the ILEC as a whole, because it is not the affiliate that needs to be profitable, but rather the parent company of the ILEC as a whole. Thus, for example, the ILEC could overprice its unbundled loops, or charge excessive rates for collocation space, and the affiliate will not care. The ILEC can set its retail rates for local exchange serve artificially high, and the affiliate will not care when it resells those services. Because the prices paid by the affiliate are not real, the affiliate can resell the service at a retail price much lower than the most efficient CLEC competitor.

The affiliate need not reflect these inputs accurately in its prices because they are not real input costs from the affiliate's point of view -- rather, they are paper prices, with the money moving from one pocket (the affiliate's) to the other pocket (the ILEC's) of the same parent company. There is no requirement that the ILEC affiliate make money. It can charge retail rates for its services that do not reflect the cost inputs from the ILEC unlike unaffiliated CLECs, for which such rates are real cost inputs that must be reflected in retail rates.

The separate affiliate structure also does not address the fundamental problem that the ILEC and its affiliate's interests are completely aligned. Thus, if the affiliate is not ready to roll out a commercial xDSL service, the ILEC will delay

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54/ See NPRM at paras. 86-87.

in making conditioned loops available, in developing the necessary OSS, and in cooperating in making better forms of collocation available until its own affiliate is ready to take advantage of them. The management of both companies, while separate individuals, may be compensated based on the earnings of each other's companies or on the basis of the holding companies' affiliates. 55/ Their products can be designed and marketed together. 56/ Whether or not bundled pricing is permitted, consumers certainly will buy products as a package. 57/ They will perceive that the same company is providing all services, and that the affiliate is the same company as the ILEC, because there is no prohibition under Section 272 on the sharing of company names and brands, nor is there a prohibition on joint advertising and (as stated above) marketing.

This is by no means an exhaustive list of the advantages that will accrue to the ILEC's affiliate, nor does it begin to give a sense of how close their operations could be in practice. No amount of rules, moreover, are enough to prevent anticompetitive and discriminatory conduct. The pace of implementation of the 1996 Act's local competition provisions are the best evidence of the willingness

55/ Non-Accounting Safeguards Order at para. 184.

56/ See id. at para. 296. A BOC may engage in the "planning, design, and development of a section 272 affiliate's offerings," but must do so consistent with the Section 272 (c) nondiscrimination requirements. Id.

57/ It is not entirely clear from the Non-Accounting Safeguards Order whether a BOC and its affiliate can provide bundle-priced packages of local and long distance service. See, e.g., paras. 291, 296.

and ability of ILECs to engage in slow-rolling of competition. The available enforcement mechanisms simply have not been sufficient to move the ball forward with any speed.

It should also go without saying that nondominant regulatory treatment of the affiliate would be contrary to the public interest and could raise serious competitive and discrimination issues. 58/ The affiliate should be considered dominant because it is the affiliate of the dominant (virtual monopoly) ILEC and, as discussed above, will not be truly independent of the ILEC. The Commission's proposed nondominant treatment of the affiliate presumably is premised on the Commission's incorrect assumption that such an affiliate would operate independently of the ILEC, and that it would stand in the same shoes as an unaffiliated CLEC. 59/ The reality is that the affiliate can work closely with the ILEC and that review of its tariff filings could reveal cross-subsidy, cost-shifting, and anticompetitive and predatory pricing. In addition, if the Commission's proposal were adopted, and Section 251(c) did not apply to the ILEC's xDSL and other advanced services capabilities, the only way that a competitor could participate in providing advanced services (other than to install its own facilities) would be to resell, under Section 251(b)(1), the affiliate's advanced services. If tariffs were not filed at all, it would be difficult for competitors even to determine what those services are

58/ NPRM at para. 100.

59/ NPRM at paras. 100, 86-87.

B. The FCC's Separate Affiliate Would Harm Consumers and Competition Without Accelerating Deployment of Advanced Services.

The FCC's logic would allow an ILEC to selectively shift its local exchange customer base to the affiliate, leaving only the low-revenue customers in the ILEC. Competitors will be left with useless resale and without the UNEs necessary to compete in provision of advanced services on a broad basis. Because of the basic economics of deployment of advanced local network facilities, the FCC's proposed approach also would doubtless shortchange smaller business, residential, and rural customers, leaving them with no choice of broadband service provider. Finally, there is no evidence that the separate affiliate will do anything to accelerate deployment of advanced services, particularly to the latter group of customers.

Competitive broadband last mile access is essential if companies like Qwest are to provide their customers with the full promise of the Qwest network. Yet the Commission would eliminate that opportunity by forcing competing service providers to purchase and collocate those electronics themselves in order to reach consumers with an xDSL link or other high-capacity facilities. Competitive access to broadband last mile facilities also is important to smaller business and residential consumers. Today business customers have available to them the option of purchasing a dedicated private line (T-1 and DS-3 rates). A "dedicated line" in a circuit or packet world means that a customer has an "always-on connection" that lets it communicate with anyone, anywhere, using voice, data, images, or video (if the speed is high enough). Most business customers already have that option today (albeit only if they purchase from the ILEC and if their bandwidth requirements AR below DS-3). Dark fiber, OC-N, xDSL, and similar technologies could give additional options to consumers -- and to the service providers who are eager to design and market high-bandwidth products to those consumers. But the model being considered by the FCC would shut down that avenue for competitors, leaving it up to the ILECs to decide whether, where and when -- and at what price -- consumers will receive the benefit of advances in technology.

The Commission also asks commenters to compare the concerns they have with the separate affiliate with the concerns they have with integrated provision by the ILECs of advanced services. 60/ The answer is that neither is optimal. The structure proposed by Qwest in the next section would help to alleviate the discrimination and anticompetitive issues raised both by integrated operations and by the Section 272-type affiliate. But if Qwest were forced to choose between wholesale deregulation of ILEC investment in advanced technology (the Commission's proposal) and the integrated provision of advanced services by the ILEC, it would choose the latter, because at least then competitors would have access to the ILEC advanced local network capabilities.

Qwest believes that it would be difficult to design an affiliate structure, short of a complete retail service/wholesale network split similar to that

60/ NPRM at para. 103.

proposed by LCI in its January 1998 "Fast Track" petition, 61/ or a divestiture of the network company, that can hope to eliminate the incentive and ability of an ILEC to impede its competitors and to discriminate in favor of itself. That being said, Qwest believes there are a number of important additional safeguards that, if established in this proceeding, could form the basis for a conclusion by the Commission that the ILEC's affiliate is sufficiently separate from the ILEC that it can qualify as a non-ILEC under Section 251(h). We discuss these additional measures in the next section.

VI. THE FCC SHOULD SPECIFY ADDITIONAL PREREQUISITES IN ORDER TO ENSURE THAT THE AFFILIATE IS "TRULY SEPARATE" AND HAS NO "UNFAIR ADVANTAGE."

Assuming that the Commission adopts a statutory interpretation that permits it to declare that an ILEC affiliate to be a non-ILEC under Section 251(h), then the Commission must adopt much stricter criteria for what qualifies as "truly separate," and must adopt additional safeguards to ensure that the affiliate gains no "unfair advantage" vis-à-vis its unaffiliated competitors.

Below, Qwest identifies several minimum characteristics of a separate affiliate structure that, if present, could form the basis for a conclusion by the Commission that the affiliate is not considered an "incumbent LEC." These characteristics are not identical to the "seven minimums" that LCI proposed in its

61/ See n. 35, supra; See also Appendix B (press release and summary of petition).